# Governance Round-Up

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## SEC Issues Guidance on Rule 14a-8(i)(9)

On October 22, the SEC issued much-anticipated guidance for the upcoming 2016 proxy season on the scope and application of Rule 14a-8(i)(9), which permits a company to exclude a shareholder proposal that directly conflicts with the company's own proposal. Under the guidance, the SEC Staff will grant no-action relief to a company in respect of Rule 14a-8(i)(9) only if "a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal."

As a result, it will be challenging for companies to exclude a shareholder proxy access proposal under Rule 14a-8(i)(9) even if management intends to include its own competing proposal. See the D&P Client Update at:

http://www.debevoise.com/insights/publications/2015/10/sec-issues-guidance-on-rule.

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## Delaware Courts Changing Rules on Disclosure-Only Settlements

In a series of recent cases, the Delaware Court of Chancery has criticized disclosure-only settlements of lawsuits challenging mergers, in which shareholders receive minimal disclosure enhancements in exchange for a broad ("intergalactic") release of future claims against the company, and plaintiffs' lawyers receive significant fees. Most notably, in mid-September, Vice Chancellor Sam Glasscock, in a Memorandum Opinion issued in connection with the proposed settlement in *In Re Riverbed Technologies Inc.*, warned that the Court of Chancery is changing course and will no longer approve disclosure-only settlements where the court does not find a rational relationship among the alleged harm, the release, and the fee.

With nearly all merger transactions valued in excess of $100 million attracting lawsuits, this development could have a significant impact on M&A-related shareholder litigation. The Court of Chancery is seeking to reduce the volume of meritless litigation by making it harder for plaintiffs' firms to secure a nearly certain fee in exchange for relatively painless settlements. One consequence, however, is that Delaware companies involved in acquisition transactions will face greater obstacles in their efforts to obtain a broad release of future claims in exchange for those same painless settlements.

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# ISS Quickscore Data Verification Open Until November 13

The annual period for companies to verify ISS's QuickScore data is open through 8 p.m. EST on November 13. Companies are encouraged to review the data and engage with ISS to correct any errors. ISS will use the data to generate its QuickScore governance ratings as well as to prepare research and voting reports. ISS has included data tracking whether companies permit proxy access. For the 2016 proxy season, this data is for informational purposes and will not be included in QuickScore results.

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# ISS 2016 Voting Policy Survey: Results And Proposed Changes

ISS published the results of its 2016 voting policy survey, which will inform the final updates to ISS's policies. Of the topics covered in the survey, ISS issued for public comment changes to voting policies on just a few topics including unilateral board actions and overboarding (directors are considered "overboarded" if their board service results in excessive time commitments and the potential inability to fulfill their duties). Comments on these policies are due on November 9. ISS's final voting polices are scheduled to be released on November 18 and will apply to annual meetings after February 1, 2016.

Highlights from the survey include:

- **Material restrictions on proxy access.** 90% of investors responded that an against or withhold vote in a director election would be warranted if a proxy access provision had an ownership threshold in excess of 5% or an ownership duration in excess of three years. A significant majority of investors also found the following terms, among others, to be problematic: ownership thresholds in excess of 3%; an aggregate limit of fewer than 20 shareholders; a cap on nominees at less than 20%; limits on third-party compensation; and renomination restrictions in the event a shareholder nominee fails to receive a specified level of support.
- **Unilateral charter and bylaw amendments.** ISS has proposed amending its current policies to provide that if a public company unilaterally amends its charter or bylaws (including, potentially, in connection with an IPO) to classify the board or establish a supermajority vote requirement, ISS will continue to issue adverse vote recommendations for director nominees until the board reverses the action or ratifies the amendment by a shareholder vote, rather than only for the year after the action is taken by the board. In the survey, investors indicated that classifying a board, diminishing rights to call special meetings, establishing supermajority vote requirements, or restricting third-party compensation of directors or director nominees may be sufficiently problematic to warrant a recommendation against directors.

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- **Overboarding**. ISS has proposed amending its current policies with respect to overboarding to limit CEOs to two public company directorships (including their own), rather than three, and to limit directors who are not CEOs to four or five public company directorships, rather than six. There would be a one-year grace period before the policy takes effect. ISS estimates that, under the proposed policy, 336 CEOs and either 61 or 231 non-CEO directors (based on a four- or five-company limit, respectively) would be considered overboarded, compared to 79 CEOs and 21 non-CEO directors under the current policy. ISS will recommend withholding votes or voting against directors who are deemed overboarded. In the survey, 48% of investors responded that two board seats was an appropriate limit for acting CEOs.
- **Executive Compensation**. 81% of investors believe that adjusted metrics can be acceptable in incentive compensation programs, with 66% noting that performance goals and results should be clearly disclosed and reconciled with GAAP metrics, and the reasons for the adjustments adequately explained.
- **Director compensation**. Investors expressed concern about equity awards, such as stock options, SARs and performance-vesting restricted stock, that may blur the distinction between the drivers of executive and director compensation or that link director compensation to management performance.

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## NYSE Amends Rules Regarding Release Of Material Information

Effective September 28, NYSE Rule 202.06 has been amended to expand the pre-market hours during which companies are required to notify the NYSE of material news so that it can halt trading if necessary, as well as to update certain procedures with respect to the communication of material news.

Previously, listed companies were required to notify the NYSE at least 10 minutes prior to releasing material news "shortly before" or during trading hours. Under the amended rules, pre-market notifications are required for news releases between 7:00 and 9:30 a.m. The NYSE noted that many companies release news during this period and that volatility in pre-market trading can affect the market open. However, a pre-market trading halt will be instituted only at a listed company's request. When halts are instituted at the NYSE's request, other national securities exchanges, some of which are open during pre-market hours, will also halt trading. Notifications are required until market close at 4:00 p.m.

For after-market material news releases, companies are now advised to wait until 4:15 p.m. (or 15 minutes after trading closes), or until the security's official closing price is published, so that all open trades may be executed at the NYSE closing price without disruption.

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# What To Say When The CEO Is Sick?

On Thursday, October 15, Oscar Munoz, the newly appointed CEO of United Continental Holdings Inc., suffered a heart attack. In the following three days, United issued one statement, reporting that Mr. Munoz was hospitalized, that the airline was operating normally, and that it would provide "further details as appropriate." On October 19, United announced that its General Counsel would immediately take over the role of acting CEO and that it was too soon to know Munoz's course of treatment and timing of recovery. The United incident raises questions about how much information boards should disclose to investors when a CEO falls seriously ill.

Balancing the executive's right to privacy, the company's disclosure obligations, and the need to thoughtfully consider interim or succession planning and investors' interest in these types of matters can be challenging, particularly in cases where an executive's long-term prognosis could vary significantly from day to day. Before Steve Jobs succumbed to pancreatic cancer in 2011, Apple Inc.'s board did not disclose the specific reasons why Mr. Jobs took two extended medical leaves. That nondisclosure prompted some corporate governance experts to push for a federal rule covering medical absences or impairments that could seriously affect a business. While SEC officials declined to promulgate such rules, boards must carefully consider transparency regarding executive illnesses as well as interim leadership plans in the event of an unexpected future absence.

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